

**FEDERAL ELECTION COMMISSION**  
**999 E Street, N.W.**  
**Washington, D.C. 20463**

**FIRST GENERAL COUNSEL'S REPORT**

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**RECEIVED  
FEDERAL ELECTION  
COMMISSION**

**MUR: 6247**

**DATE COMPLAINT FILED: January 19, 2010**

**DATE OF NOTIFICATION: January 26, 2010**

**DATE LAST RESPONSE RECEIVED: February  
17, 2010**

**DATE ACTIVATED: March 17, 2010**

**SOL: November 3, 2014**

**COMPLAINANT:**

**Vickers L. Cunningham**

**RESPONDENTS:**

**www.examiner.com**

**Friends of David Smith and Lucie Weaver, in her  
official capacity as Treasurer**

**David A. Smith**

**Anschutz Company**

**Clarity Digital Group, LLC**

**RELEVANT STATUTES:**

**2 U.S.C. § 441b(a)**

**2 U.S.C. § 431(9)(B)(i)**

**2 U.S.C. § 441d**

**47 U.S.C. § 230**

**11 C.F.R. § 109.21**

**11 C.F.R. § 100.26**

**11 C.F.R. § 100.73**

**11 C.F.R. § 100.94**

**11 C.F.R. § 100.132**

**11 C.F.R. § 110.11**

**11 C.F.R. § 114.2**

**INTERNAL REPORTS CHECKED:**

**None**

**FEDERAL AGENCIES CHECKED:**

**None**

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**I. INTRODUCTION**

This matter involves allegations that Anschutz Company ("Anschutz") and Clarity Digital Group, LLC, d/b/a Examiner.com ("Examiner") (together with Anschutz, the "Examiner Entities"), David Smith ("Smith"), and Friends of David Smith and Lucie Weaver, in her official capacity as Treasurer ("the Committee"), made and accepted corporate in-kind contributions and failed to include required disclaimers in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"), and its accompanying regulations, in connection with a posting made on Examiner's website relating to a fundraiser for Smith's congressional campaign (the "Announcement").

As discussed below, because the press exemption set forth in 11 C.F.R. § 100.73 applies, we recommend that the Commission find no reason to believe that the Examiner Entities, Smith, and the Committee (together, the "Respondents"), violated the Act by making or receiving corporate in-kind contributions or failing to include required disclaimers on the Announcement. We also recommend that the Commission find no reason to believe that Smith violated the Act by failing to file a timely Statement of Candidacy. We further recommend that the Commission close the file with respect to all Respondents.

**II. FACTUAL AND LEGAL ANALYSIS**

**A. Factual Background**

Examiner operates a website that provides local information, resources, and perspectives on approximately 240 different cities in North America, almost exclusively through user-generated content. Examiner Resp., 2. Contributors (hired as independent contractors and referred to as "Examiners") are recruited and paid for their contributions to the website on the basis of page views, unique visitors, session length, and advertising performance. *Id.* While

1 Examiner does not review or edit postings submitted by Examiners, it retains the right to remove  
2 any posting in the event the posting does not comply with Examiner's policies, or in the event  
3 Examiner finds the posting unacceptable for any other reason. *Id.*

4 Smith was a candidate for the Republican nomination in the race for U.S. Representative  
5 from Texas' 32<sup>nd</sup> Congressional District.<sup>1</sup> A Statement of Organization designating Friends of  
6 David Smith as Smith's principal campaign committee was filed on December 30, 2009.

7 Smith became the Examiner assigned to report on Dallas County Republican politics in  
8 July 2009, and since that time has contributed approximately 300 postings. *See* Dallas County  
9 Republican Examiner's Articles, [http://www.examiner.com/x-17004-Dallas-County-Republican-](http://www.examiner.com/x-17004-Dallas-County-Republican-Examiner)  
10 Examiner. On November 3, 2009, Smith posted the Announcement on Examiner's website  
11 declaring his candidacy and including information about his "Fundraiser & Campaign Kick-Off,"  
12 to be hosted at a local restaurant. The Announcement also included a disclaimer stating that the  
13 "event notification" was not subject to state reporting requirements. Examiner Resp., 2.

14 The Complaint alleges that the Examiner Entities made, and Smith accepted, prohibited  
15 corporate contributions in connection with a coordinated communication in violation of 2 U.S.C.  
16 § 441b. Complainant further alleges that the Announcement failed to include disclaimers  
17 required by 2 U.S.C. § 441d. Lastly, Complainant alleges that Smith violated the Act by failing  
18 to file a Statement of Candidacy with the Commission.

19 After receiving the Complaint, Examiner removed the Announcement from its website  
20 and suspended Smith from posting additional material pending the resolution of this matter.  
21 Examiner Resp., 3. The Examiner Entities' response to the Complaint argues that: (1) there has

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<sup>1</sup> The Republican primary was held on March 2, 2010, and the incumbent, Rep. Pete Sessions, garnered approximately 83% of the votes cast, defeating Smith. Office of the Secretary of State of Texas, *2010 Republican Party Primary Election, Election Night Returns* at [http://enr.sos.state.tx.us/enr/results/mar02\\_148\\_state.htm](http://enr.sos.state.tx.us/enr/results/mar02_148_state.htm).

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1 been no transfer of value that could qualify as a "contribution" or "expenditure" under the Act;  
2 (2) even if the Announcement did qualify as a "contribution" or "expenditure," the press  
3 exemption applies; (3) Examiner, as an "independent internet medium," has no disclosure or  
4 disclaimer requirement with respect to the Announcement; (4) Examiner is immune from civil  
5 liability pursuant to § 230 of the Communications Decency Act of 1996; and (5) the amount in  
6 question is *de minimis*. See generally Examiner Resp.

7 Smith also filed a response in which he asks the Commission to dismiss the Complaint  
8 brought by a supporter of his political opponent because the Announcement "was treated not as a  
9 paid advertisement but as newsworthy content" and Smith's "intent was not to skirt the laws . . .  
10 but to make public an announcement." Smith Resp., 4.

11 **B. ANALYSIS**

12 **1. Press Exemption**

13  
14 The Act prohibits corporations from making contributions from their general treasury  
15 funds in connection with the election of any candidate for Federal office. 2 U.S.C. § 441b(a);  
16 11 C.F.R. § 114.2(b)(1). The Act and Commission regulations define the term "contribution" to  
17 include any gift of money or "anything of value" for the purpose of influencing a Federal  
18 election. See 2 U.S.C. § 431(8)(A); 11 C.F.R. § 100.52(a). The term "anything of value"  
19 includes all in-kind contributions, 11 C.F.R. § 100.52(d)(1), such as communications that are  
20 coordinated with a candidate. 11 C.F.R. § 109.21. Exempt from the definition of contribution,  
21 however, are "any cost[s] incurred in covering or carrying a news story, commentary, or editorial  
22 by any broadcasting station (including a cable television operator, programmer or producer),  
23 Web site, newspaper, magazine, or other periodical publication, including any Internet or  
24 electronic publication, . . . unless the facility is owned or controlled by any political party,

political committee, or candidate[.]” 11 C.F.R. § 100.73. This exclusion is known as the “press exemption.”

The Commission has recognized that political speech on the Internet is “distinct from other media in a manner that warrants a restrained regulatory approach.” *Explanation and Justification for Final Rules on Internet Communications*, 71 Fed. Reg. 18,589, 18,589 (Apr. 12, 2006). Accordingly, the press exemption has been extended to “media entities that cover or carry news stories, commentary, and editorials on the Internet,” *id.* at 18,608, as well as “bloggers and others who communicate on the Internet.” *id.* at 18,610; *see* Advisory Opinions 2008-14 (Melothe); 2005-16 (Fired Up!); 2000-13 (iNEXTV); MUR 5928 (Kos Media, LLC).

The Commission conducts a two-step analysis to determine whether the press exemption applies. First, the Commission asks whether the entity engaging in the activity is a press entity as described by the Act and regulations. *See* Advisory Opinion 2005-16 (Fired Up!). Second, in determining the scope of the exemption, the Commission considers: (1) whether the press entity is owned or controlled by a political party, political committee, or candidate; and, if not, (2) whether the press entity is acting as a press entity in conducting the activity at issue (i.e., whether the entity is acting in its “legitimate press function”). *See Reader’s Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981). If the press entity is not owned or controlled by any political party, political committee, or candidate, and if it is acting as a press entity with respect to the conduct in question, the Commission lacks subject matter jurisdiction over the complaint. *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981).

Two considerations in determining whether an entity is acting in its legitimate press function include whether the entity’s materials are available to the general public and whether they are comparable in form to those ordinarily issued by the entity. Advisory Opinion 2005-16

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1 (Fired Up!) (*citing* *FEC v. Massachusetts Citizens for Life ("MCFL")*, 479 U.S. 238, 251  
2 (1986)). The Commission has recognized that an entity otherwise eligible for the press  
3 exemption "would not lose its eligibility merely because of a lack of objectivity in a news story,  
4 commentary, or editorial, even if the news story, commentary, or editorial expressly advocates  
5 the election or defeat of a clearly identified candidate for Federal office." Advisory Opinion  
6 2005-16 (Fired Up!); *see* MUR 5928 (Kos Media, LLC). Additionally, the Commission has  
7 concluded that press entities do not forfeit the press exemption if they solicit contributions for  
8 candidates. *Explanation and Justification for Final Rules on Internet Communications*, 71 Fed.  
9 Reg. at 18,609. A solicitation for contributions may appear in a commentary that is a regular  
10 feature of a website, provided that the solicitations themselves do not become a regular feature of  
11 its content. *See* Advisory Opinion 2008-14 (Melothe) ("[T]he intermittent provision of a  
12 hyperlink directing a media Web site's visitors to a campaign's contribution page . . . would not  
13 be prohibited.") (*citing* Advisory Opinion 1980-109 (Ruff Times)).

14 Complainant acknowledges that Examiner, which bills itself as a "citizen journalism  
15 online publishing organization," qualifies as a press entity. *See* Compl., 2. Complainant alleges,  
16 though, that the Respondents cannot claim the press exemption because Smith "has full control  
17 over the content of his postings," and that the Announcement was not a *bona fide* news story,  
18 editorial, or commentary as set forth in Advisory Opinion 2005-07 (Mayberry) and thus did not  
19 constitute a legitimate press function. Compl., 2-3. However, the Complaint does not allege, nor  
20 does any available information suggest, that a political party, political committee, or candidate  
21 owns or controls the Examiner Entities. Rather, Examiner maintained ultimate control over  
22 Smith's postings, which it demonstrated by removing the Announcement from the website upon  
23 receiving the Complaint. Furthermore, the Commission's opinion in Mayberry relied on the

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1 fact—not present here—that the candidate co-owned the publications in which he planned to  
2 distribute his opinion columns. *See* Advisory Opinion 2005-07 (Mayberry); *see also* 11 C.F.R.  
3 §§ 100.73, 100.132. Therefore, Smith's role in the Announcement does not constitute ownership  
4 or control of Examiner for purposes of the press exemption.

5 Furthermore, both generally and with respect to the Announcement, Examiner is free and  
6 available to the public without subscription or registration. *See* Advisory Opinion 2008-14  
7 (Melothe). The Announcement was also comparable in form to Smith's ordinary postings in that  
8 it pertained to Dallas County Republican politics and appeared as part of Smith's regular series,  
9 and in his regular space, on Examiner's website. There is no indication that solicitations for  
10 contributions became a regular feature of Smith's postings, or of Examiner's website. Indeed,  
11 Examiner was acting within its legitimate press function, and the Respondents may therefore  
12 receive the benefit of the press exemption. Accordingly, we recommend that the Commission  
13 find no reason to believe Anschutz Company, Clarity Digital Group, LLC, d/b/a Examiner.com,  
14 David Smith, and Friends of David Smith and Lucie Weaver, in her official capacity as  
15 Treasurer, violated 2 U.S.C. § 441b.

16 Because the Announcement qualifies for the press exemption, it does not constitute a  
17 coordinated communication, nor does it require disclaimers pursuant to 2 U.S.C. § 441d or  
18 11 C.F.R. § 110.11. Likewise, it is unnecessary to determine the viability of the claims in the  
19 Examiner Response that the Communications Decency Act of 1996 protects Examiner, and that  
20 Smith can avail himself of the exemption set forth at 11 C.F.R. § 100.94 for uncompensated  
21 Internet activity.

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**2. Statement of Candidacy**

Within fifteen days after becoming a candidate under 2 U.S.C. § 431(2), a candidate shall designate his or her principal campaign committee by filing a Statement of Candidacy on FEC Form 2. *See* 2 U.S.C. § 432(e); 11 C.F.R. § 101.1(a). An individual becomes a candidate when the individual, another person on the individual's behalf and with the individual's consent, or a combination thereof, receives contributions aggregating in excess of \$5,000 or makes expenditures aggregating in excess of \$5,000. *See* 2 U.S.C. § 431(2); 11 C.F.R. § 100.3.

Although the Committee filed a Statement of Organization on FEC Form 1 on December 30, 2009, the Commission has no record of a Form 2 Statement of Candidacy filed by Smith. However, according to the internal disclosure reports filed with the Commission, neither the total amount of contributions received, nor the total amount of expenditures made, either by or on behalf of Smith, exceeds \$5,000. *See* [http://query.nictusa.com/cgi-bin/cancomsrs/?\\_10+H0TX32020](http://query.nictusa.com/cgi-bin/cancomsrs/?_10+H0TX32020) (last visited on April 19, 2010). Therefore, Smith was not required to file a Statement of Candidacy, and the Statement of Candidacy was not untimely. Accordingly, we recommend that the Commission find no reason to believe David Smith violated 2 U.S.C. § 432.

**III. RECOMMENDATIONS**

1. Find no reason to believe that the Respondents violated 2 U.S.C. § 441b.
2. Find no reason to believe that the Respondents violated 2 U.S.C. § 441d.
3. Find no reason to believe that David Smith violated 2 U.S.C. § 432.
4. Approve the attached Factual and Legal Analyses.



5. Approve the appropriate letters.

6. Close the file.

Thomasenia P. Duncan  
General Counsel

Date: 6-11-10

By:

Kathleen Guith  
Kathleen Guith  
Deputy Associate General Counsel

Mark Shonkwiler  
Mark Shonkwiler  
Assistant General Counsel

Peter Reynolds  
Peter Reynolds  
Attorney

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